No. 21700

IN THE

United States Court of Appeals For the Ninth Circuit

NORMAN B. SATHER,
Appellant,

v.

GENERAL ELECTRIC COMPANY,
a New York corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the Honorable John C. Bowen, sitting without a jury, in favor of appellee. The jurisdiction of the District Court was based upon diversity of citizenship under 28 U.S.C. 1332. The jurisdictional allegation appears in Paragraph II of the Petition for Removal (R. 1) and paragraph I of the Findings of Fact (R. 49).

The jurisdiction of the Court of Appeals is based upon 28 U.S.C. 1291. Judgment for the appellee was entered December 19, 1966 (R. 53) and Notice of Appeal was given by the appellant on January 12, 1967.

STATEMENT OF THE CASE

Norman B. Sather has been selling General Electric appliances for fifteen years (Tr. 16). General Electric has been distributing appliances from their Tukwila plant, near Seattle, since December of 1961, when they first built their new warehouse (Tr. 98), and appellant has been picking up his appliances from that warehouse since that time (Tr. 47).

The appellee's warehouse has only one ramp to facilitate trucks wishing to load appliances (Tr. 111). The rampway is divided with a center line to designate two parking stalls for two vehicles at one given time (Ex. 1). Appellant used the right-hand parking stall because the left one was occupied or in the process of being occupied at the time the appellant went to park his vehicle (Tr. 18). Due to the narrowness of the rampway, there remained only 11½ inches of space in the parking stall on each side of the appellant's vehicle after he had parked. The rampway in question measures 15 feet, 9 inches from outside to outside. The two curbs, one on each side, take up an additional 10 or 11 inches, inasmuch as they are 5⅞ inches wide each, leaving 18 feet, 9 inches from the inside of the two curbs. The painted line down the middle of the rampway is in dead center, therefore, each

stall has 9 feet, 4½ inches of parking space. The plaintiff's vehicle is 7 feet, 5½ inches wide. Nine feet, 4½ inches equals 112½ inches and 7 feet, 5½ inches equals 89½ inches, the difference between the two being exactly 23 inches (R. 44). Assuming the appellant was in the middle of his individual stall, he would have 11½ inches on each side of his truck in which to walk.

Appellant, upon exiting from his truck, had but two ways to go; (1), to walk on the curb, as he did and always has done (Tr. 65); and (2), jump down from the top of the ramp, some thirty inches, onto cement and use the stairs after he was on the ground level (Tr. 104).

Appellant could not exit from the passenger's side of his vehicle for a number of reasons; (1) he had a gear shift and merchandise in the cab with him (Tr. 20); and (2) the other parking stall was in the process of exchanging vehicles (Tr. 81).

Appellant therefore by necessity elected to walk on top of the raised curb and consequently he fell and sustained serious and permanent injuries.

SPECIFICATIONS OF ERRORS

Appellant contends the District Court erred in the following respects:

1. In holding that the appellee owed no duty to the appellant as a business invitee to provide a safe place to load appliances;

2. In holding that the appellee was not guilty of willful

and wanton misconduct in the construction and maintenance of its loading ramp;

3. In holding that the appellant was guilty of contributory negligence;

4. In holding that the appellant assumed the risk of the dangerous condition;

5. In holding that the appellant had a reasonable alternative;

6. In holding that the appellee was free from negligence;

7. In reversing its findings and conclusions handed down at the conclusion of the trial and adopting the proffered findings and conclusions of the appellee, which were broader in scope and unsupported by the evidence, particularly as to the findings of:

(a) assumption of the risk on the part of the appellant;

(b) contributory negligence on the part of the appellant;

(c) a reasonable alternate route available to the appellant;

(d) a compliance with the uniform building code; and

(e) an exercise of reasonable care on behalf of the appellee.

ARGUMENT

Appellant used the facilities provided by the appellee to the best of his ability. He makes his living selling Gen-

eral Electric products and must pick up his appliances at the appellee's warehouse, which is provided for that purpose. He either uses these facilities that are offered him or takes his business to Westinghouse or some other competitor. The latter alternative is not required in law, as it is an extreme alternative not required by a reasonably prudent man.

Part I

The District Court Erred in Holding That the Appellee Owed No Duty to the Appellant as a Business Invitee

At no place in the oral decision of the District Court was there a mention of the duty the appellee owed the appellant. The court reasoned in reverse on this point. It stated (Tr. 125) by implication there was negligence on the part of the appellee in not providing a loading ramp that could be used safely, but reasoned on the other hand that the appellant would not have been injured had he not come to Seattle that day. The court states that "All of the proximate causes and contributing causes of the accident and the resulted injury, none of them existed or became active before appellant's truck came into the loading ramp."

The reasoning of the court in the above quotation is like saying there is no danger in a vehicle without brakes until you drive it.

No mention was made of the appellee's duty to furnish a safe place to work. This duty is well known in legal precedent and is defined amply in 81 A.L.R.2d 750 in

an article entitled, *"Liability of Proprietor of Business Premises for Injury From Fall on Exterior Walk, Ramp or Passageway Connected With the Building in Which the Business is Conducted."* The author in this article made the following observation in regard to the duty of a business proprietor to keep his premises in a safe condition for business invitees.

> "It is a well established principle of the law of negligence that the proprietor of a store, shop or similar place of business owes a duty of reasonable care to keep in a reasonably safe condition those portions of the premises which he should expect will be used by his customers (see 38 Am. Jr. Negligence Section 131-133-134). It is also well recognized that a proprietor's obligation includes that of exercising ordinary care to keep his approaches, entrances and exits in a reasonably safe condition for the use of customers entering or leaving the premises. This principle is either stated or assumed in all the cases connected in this annotation."

An article in 95 A.L.R.2d 995 calls this duty *"Premises Liability"* and summarizes the duty of the premises owner towards those that are invited to use the premises, by saying:

> "Elementary considerations of justice and public policy demand the imposition upon the landowner of the duty of care and corresponding liability for its breach."

The history and logic of the duty of the landowner towards the invitee as set forth in 95 A.L.R.2d 995, *supra,* is amply stated in the following quotations:

> "During the eighteenth and nineteenth centuries

the common law developed, in various areas of tort law, a number of rather technical rules expressing the relationship between an actor and a sufferer which was felt to be necessary before tort liability could be imposed. The underlying theory was apparently that the person acting and the person suffering must be regarded as having in a sense 'contracted' with each other as to the care the one would take and the risks the other would assume, and from this theory grew various rules as to the necessity of privity between tortfeasor and injured party in some situations, as well as rules as to the assumption of risk by employees and others.

"Whether as the result of similar developments or not, there grew up, in the area of what is now called 'premises liability,' various rules classifying persons going upon the land of another according to their supposed relationship with the landowner, whose duty of care toward such persons while they were on his property varied according to the particular class into which the entrant fell.

"Traditionally, this classification has been into (1) trespassers, who entered without invitation or permission and were entitled to minimal care, (2) licensees, whose entrance was merely tolerated by the landowner, and who were entitled to a slightly greater degree of care than a trespassers, and (3) invitees, whose presence was actively desired and induced by the landowner, and who were entitled to have him exercise reasonable care for their safety while they were on the premises.

"Both the language and the concept of 'invitee' and 'invitation' caused considerable difficulty in the explication and application of the law, since the courts were reluctant to apply any strict rule of care with respect to maintenance of the premises in favor of social guests, even though the social visit might have been expressly invited or even strongly urged,

while on the other hand, there were a number of situations in which, while it was difficult to find any express or even implied invitation to come upon the premises, it was felt that elementary considerations of justice and public policy demanded the imposition upon the landowner of the duty of care and corresponding liability for its breach.

"Perhaps the clearest and most common case in which an actual or implied invitation can be found is that where the owner or occupant of the land has an actual financial or economic interest in the visit, and, probably as a reaction to the difficulties inherent in the 'invitation' concept, some courts and writers took the view that this was the only situation in which a technical invitation could be found, that is, that some economic benefit, real or fancied, was a necessary precondition of an invitation in this sense, and accordingly that an entrant upon the land of another was not entitled to the exercise of ordinary care to keep the premises in reasonably safe condition (was not an invitee), unless the purpose of the visit was more or less directly connected with the enhancement of some actual or supposed economic interest of the landowner."

The trial court chose not to discuss this duty, much less hold that it had not been breached in the case at bar.

Counsel for the appellee saw fit to interject in his proposed conclusions of law that no duty had been breached on the part of appellee but this was not the findings of the trial court as can be seen from the court's conclusion on page 124 and 125 of the transcript.

Appellant was clearly a business invitee. He meets all the tests used in Washington for determining the status of an individual on the property of another. The "economic

benefit test" is the major test when the landowner or defendant is in business. Authority for the economic benefit test is found in *McKinnon v. Washington Federal Savings & Loan Association,* 68 Wn.2d 640, where the court stated:

> "Under this test (economic benefit) an invitee is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant is then engaged. To qualify as an invitee or business visitor under this definition, it must be shown that the business or purpose for which the visitor comes upon the premises is of actual or potential benefit to the owner or occupier thereof."

Before the *McKinnon v. Washington Federal Savings and Loan Association* case, *supra,* the leading case in Washington on this subject was *Ward v. Thompson,* 57 Wn.2d 655, where the court stated:

> "As to the matter of respondent's legal status, it is amply clear, based on the undisputed facts, that respondent was a business invitee. It is generally acknowledged that an occupier of land owes a greater duty to invitees than to licensees, principally with respect to the inspection and discovery of hidden dangers and defects on his land. The problem is not so much what duties are owed to an invitee, but, rather, who qualifies as an invitee. Broadly speaking, there are two tests: (1) the economic benefit test, and (2) the invitation test. The test set forth in 2 Restatement, Torts, 897 Sec. 332, defines a business visitor as
>
> "'. . . a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them.'

"This is generally interpreted to mean that some economic benefit (though it may be indirect) must be conferred upon the occupier by the visit. To date, the economic benefit test seems to have prevailed in this state.

"To attain the status of an invitee, this court held in the case of *Dotson v. Haddock*, 46 Wn.2d 52, 278 P.2d 338 (1955) that

" '. . . it must be shown that the business or purpose for which the visitor comes upon the premises is of material or pecuniary benefit, actual or potential, to the owner or occupier of the premises.'

"See, also, *Kinsman v. Barton & Co.*, 141 Wash. 311, 251 Pac. 563 (1926); *Christensen v. Weyerhaeuser Tbr. Co.*, 16 Wn.2d 424, 133 P.2d 797 (1943); *Cf. Porter v. Ferguson*, 53 Wn.2d 693, 336 P.2d 133 (1959)."

"But aside from the technicalities of respondent's legal status, in our view, appellants owed a duty to maintain the scaffolding in a reasonably safe condition, and this duty extended to *all* persons standing thereon with the permission, express or implied, of appellants. By their very nature, any substantial defects in the construction of a scaffold necessarily involve recognizable risks of serious bodily harm to any persons standing on it. *Cf. Straight v. B. F. Goodrich Co.*, 354 Pa. 391, 47 A.2d 605 (1946). The duty of appellants to maintain the scaffold in a reasonably safe condition cannot be abrogated or altered on the basis of timeworn distinctions between licensees and invitees. *Cf. Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 355 P.2d 781 (1960). Where the danger of harm is great, as it is with scaffolds, ladders, and the like, public policy requires that the occupier of the premises take the utmost precaution to keep such equipment in a safe condition."

The trial court stated there was negligence on the part

of the defendant but that "it did not become active until plaintiff's truck came onto the ramp" (Tr. 125). If this was the test, no business invitor would have anything to worry about. The court is actually ruling that the appellant should have stayed home in bed and he would not have been injured.

Part II

The Court's Second Error Was in Holding the Defendant Was Not Guilty of Willful and Wanton Misconduct in the Construction and Maintenance of Its Loading Ramp

Appellant, out of necessity, had walked on the curb many times before (Tr. 65).

Appellant's Exhibit 1 shows an unidentified man walking the curb and it appears he had ample room between the curb and the truck to walk on the flat surface of the ramp. It stands to reason that the appellee knew or should have known the ramp as constructed was inadequate. Appellee, knowing this fact, plus the fact the ramp's inadequacy was the result of original construction, makes appellee guilty of willful, wanton misconduct.

The test for determining willful, wanton misconduct is found in 38 Am. Jur., Section 178, where the author states the meaning of willful, wanton or reckless as:

> "A defendant's act is properly characterized as willful, or wanton, or reckless within the meaning of the foregoing rule, only when it was apparent, or reasonably should have been apparent to the defendant, that the results were likely to prove disastrous to the plaintiff and he acted with such an indifference to-

> ward, or utter disregard of, such a consequence that it can be said he was willing to perpetrate it. The elements necessary to characterize an injury as willfully or wantonly inflicted are (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, and (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another."

Using the above three tests, we find the appellant in the case at bar met all three elements.

(1), the appellant had knowledge by implication, if not actual knowledge, of the ramp's inadequacy, as it had been built for four years (Tr. 98). (2), the appellant's ability to avoid the situation was the simple installation of a guard rail. (3), the apparent danger was obvious to even a naive reasonably prudent man.

In respect to knowledge on the part of the appellee, as outlined in paragraph one above, the court's attention is called to 65 A.L.R.2d 420, in an article entitled, *"Liability of Proprietor of Store, Office or Similar Business Premises for Injury From Fall on Ramp or Inclined Floor."* At page 435 of this article under the subheading, *"Breach of Duty as Affected By Notice of Condition of Ramp Or Incline,"* the author states as follows:

> "It may be of value to note in passing that an issue as to notice appears never to have arisen in a case in which it was claimed that the fall occurred because the ramp or inclined floor was *defective as*

> *a matter of its original construction.* It would seem manifest that no proof of notice would be required with respect to such an inherent defect."

The leading case of *Adkisson v. Seattle,* 42 Wn.2d 676, in defining wanton misconduct, stated:

> "Wanton misconduct is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative. It is the intentional doing of an act, or the intentional failure to do an act, in reckless disregard of the consequences, and under such surrounding circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another."

The appellant would then, under the above rules, be precluded from claiming contributory negligence on the part of the appellant even if same was shown.

The court therefore erred in finding for the appellee.

Part III

The Court Erred in Holding Appellant Was Contributorily Negligent

Although the court said nothing about contributory negligence in its concluding statement (Tr. 125), the appellee's findings of fact and conclusions of law were adopted by the court when presented. It therefore is not known by the appellant from what portion of the evidence the court decided the appellant was contributorily negligent.

Appellant alleges there could be no contributory negligence, as appellant had no "reasonable alternative."

Authority for the "reasonable alternative" requirement is found in the landmark case of *Kingwell v. Hart*, 45 Wn.2d 401, at page 405, where the court states as follows:

> "Contributory negligence or unreasonable conduct on the part of the plaintiff in view of the foreseeable risk, may be confused with the latter defense, where no real consent to relieve defendant of any duty can be found, but plaintiff has exposed himself voluntarily to an appreciated and known unreasonable risk. In other words, an added inquiry appears of contributory negligence also is asserted, that is, was plaintiff's own conduct under the circumstances unreasonable, in view of the foreseeable risk, so that it can be said that there was breach of duty on the part of the injured person."
>
> "It follows that the inquiry in a tort case presenting the issues raised on this appeal, may include three questions: Did plaintiff (1) know of and appreciate the danger or risk involved and also (2) did he voluntarily consent to expose himself to it (*'voluntarily' including the meaning that defendant's conduct has left plaintiff a reasonable election or alternative*) . . . and (3) was the exposure unreasonable, that is, was it such that a reasonable person in plaintiff's postion would expose himself to it, or, after accepting a reasonable risk, did plaintiff exercise proper care for his own protection against that risk."

It is clear that the appellant had no reasonable alternative. If he was to load appliances, he had to use this particular ramp. And by using the ramp he had no place to go when he exited from his truck, except to walk the curb (Tr. 65).

Appellee attempts to make it appear as if the appellant could walk down the inclined portion of the raised curb

and reach the ground level, thus giving him access to the stairway (Tr. 65 and 66) but as the appellant explained in his testimony, he thought it safer to walk a level curb rather than an inclined curb if he was forced to walk a curb at all (Tr. 66). In addition, to walk down the inclined curb would require the appellant to negotiate around his door and mirror of his truck (Tr. 66), an act which, in the minds of reasonable men, would not be safe while perched atop a five-inch curb, thirty inches above a cement parking lot (Tr. 66).

At no place in the appellee's evidence was there a suggestion of a reasonable alternative. The only alternative was to pull the truck off the ramp. This is not a reasonable alternative. Appellee placed the ramp and warehouse at the appellant's disposal and the appellant makes his living selling General Electric products (Tr. 16). It is not reasonable to ask appellant to go elsewhere for his appliances.

The only other alternative the appellant had was to jump off the ramp onto the cement parking lot and then use the stairs (Tr. 102, 103, 104). Appellee's witness, Steiner, stated on cross-examination, the only two ways the appellant could have gotten into the warehouse was to (1) jump off the ramp or (2) walk down the incline and use the stairs (Tr. 104). But, appellant under cross-examination (Tr. 65), states there was not enough room to walk down the incline, as his truck, by necessity, was parked too close to the curb and he would have to walk on top of the incline. Instead, he chose to walk on top of a level curb.

The pretrial order (R. 43) contains all the necessary measurements. These measurements show that the loading ramp was too narrow. When the appellant parked his truck in the right-hand stall, he had 23 inches of space left. In other words, due to the narrowness of the rampway, appellant, by utilizing only the one stall, the presence of another truck or vehicle preventing any other course of action, found himself with inadequate room to reach his goal without walking on top of the curb.

The appellant argues that the proximate cause of the accident was the inadequate facilities of the appellee. The appellee failed to build an adequate rampway or it failed to make the one in existence safe by the use of guardrails.

In looking for another alternative, the *Reeder v. Sears, Roebuck Company,* 41 Wn.2d 550 is cited. It is a case involving injuries suffered by the plaintiff when the ramp of the defendant collapsed. The defendant in this case attempted to escape liability under the theory that the plaintiff had an alternate route or entrance to the store or warehouse. The court properly rejected the proposed instructions to that effect and stated:

> "From appellant's photographs and other evidence, the jury could have found that the ramp was the only *reasonable and convenient means of entrance* to the rear of the building and that respondent had been invited to use it."

In the case at bar we have no other alternative, much less a "*convenient*" one.

Section 134 of Volume 38, Am. Jur., adequately de-

scribes the appellee's duty to the appellant in discussing *Approaches, Entrances and Exits,* where the general rule of the proprietor's duty towards business customers is as follows:

> "However, the owner of a public place of business who leaves a dangerous condition upon his premises cannot avoid liability for injury to one who, coming upon the premises on lawful business, is injured by coming in contact therewith, on the theory that it was not in the path which he was entitled to travel, if it was so close thereto that he *could not transact his business without coming in such proximity to the dangerous condition* as to render it perilous to him." (Emphasis supplied)

It is quite apparent in the case at bar that the appellant here could not "transact his business *without coming in such proximity to the dangerous condition* as to render it perilous to him."

It has been argued before that to require the appellant to go elsewhere is not required in law. The case of *Rush v. Commercial Realty Company,* Supreme Court of New Jersey, 1929, 141 Atlantic 476, was a case involving a suit tendered against the landlord where the tenant had fallen through the defective floor of an outdoor privy.

> "In such a situation it would seem that the argument for a non-suit must be restricted to the question of contributory negligence and assumption of risk. In dealing with these, it should be observed that Mrs. Rush had no choice, when impelled by the call of nature, but to use the facilities placed at her disposal by the landlord, to-wit, a privy with a trap door in the floor, poorly maintained. *We hardly think this was the assumption of a risk; she was not*

required to leave the premises and go elsewhere."

In other words, the court is saying that even though the appellant recognized the dangerous condition he was not required to go elsewhere. He could use the facilities to the best of his ability.

The test that is applied to the appellant's conduct is that an ordinary prudent person would have done under the circumstances. Volume 38 Am. Jur., Section 190. This section is entitled *"Degree and Standard of Care"* and states as follows:

> "The measure of care required of a person in the interest of his own safety is ordinary or reasonable care, according to the circumstances of the case."
>
> "Contributory negligence is to be determined, not according to what the plaintiff or decedent might have done, but according to what a reasonable person would have done under the circumstances."
>
> "The standard by which the conduct of the plaintiff is judged is the conduct of ordinarily prudent persons under like or similar circumstances, conditions and surroundings."

Section 193 of Volume 38 Am. Jur., states as follows:

> "However, one is not always chargeable with negligence, even though he does not adopt the safest and best course to avoid injury. The law does not require a choice unerring in the light of after events; it requires such a choice as, under all the known or obvious circumstances, a reasonably prudent man might make."

Section 182 of Volume 38 Am. Jur., entitled *"Exposure to Peril"* gives us the following definitions and tests in

looking for the duty of an injured party:

> "Exposure to known danger, however, is not always contributory negligence.
>
> "Even the most prudent man is sometimes compelled to take risks; at least some risk is inherent in the ordinary activities of life.
>
> "It has been said that the taking of a risk is negligent, only when the risk is greater than is reasonably necessary to meet the ordinary requirements of business, or even pleasure.
>
> "The fact that one who took a risk took it in the performance of duty is entitled to great weight in determining whether his conduct was negligent."

An article in 61 A.L.R.2d 174, entitled "*Liability of Proprietor of Store, Office or Similar Business Premises for Injury or Fall Due to Litter or Debris on Stairway,*" at page 199, it is suggested that contributory negligence or assumption of risk is not available to business proprietors for injuries sustained on falls on stairways due to litter. This article therefore strongly infers a greater duty upon a business proprietor than is heretofore seen.

Part IV

The Court Erred in Holding Appellant Assumed the Risk

Here, again, the words "assumption of risk" were not used by the trial judge (Tr. 125). Assumption of the risk was a defense of the appellee introduced in the findings.

Assumption of the risk and contributory negligence under circumstances such as these are treated synony-

mously in Washington. *Nelson v. Booth Fisheries Company,* 165 Wash. 521, states:

> "In the latter relation of proprietor and invitee, denial of recovery is, in like circumstances, usually rested upon the principle of contributory negligence, although this court has, at times, spoken of it as the assumption of a risk."

Therefore, arguments of the appellant pertaining to lack of contributory negligence would and should be considered equally for determining the issues of assumption of the risk.

Part V

The Court Erred in Holding the Appellant Had a Reasonable Alternative

At no place in the appellee's evidence was there a suggestion as to what appellant should have done differently. Appellee's entire case hinges on the appellant's method of gaining access to the appellee's warehouse. At no place did they suggest what he could have done differently.

Figures set forth in the pre-trial order (R. 43) make it apparent that the appellant had no room to walk after parking his truck. Appellee does not dispute this. Appellee attempts to make it appear the appellant could have walked down the ramp to the ground level (Tr. 65) but appellant's explanation makes it obvious the route he chose was safer than the suggested route. As explained before, if the appellant, by the negligence of the appellee, had no place to walk except on top of a five-inch curb, it is safer to walk a curb that is level

rather than one that is slanted. This, plus the hazard of the door and the mirror (Tr. 65, 66), makes the appellant's selected route the obvious one a reasonable and prudent man would have selected.

It is noted the appellee did not suggest that appellant should have jumped down off the ramp. Appellant, after all, was fifty-one years old and weighed 210 pounds (Tr. 21).

Nor does the appellee suggest the appellant should have left or drove his truck off the ramp. The judge did, but not the appellee. This cannot be the law; otherwise, the duty of a business proprietor to furnish a safe place for a business invitee would be abrogated. The courts would then simply say the business invitee should have stayed in bed.

Part VI

The Court Erred in Holding the Appellee Was Free From Negligence

The duty of the appellee to furnish a safe place for the appellant to transact his business has been previously discussed under alleged error Number II.

Part VII

The Court Erred in Adopting the Proffered Facts and Conclusions of the Appellee, Which Were Inconsistent With the Oral Decision of the Court

By so doing, the appellant is denied an opportunity to discuss the court's ruling on appeal. The court said

nothing about assumption of the risk, or even the duty of the appellee to provide a safe place for the appellant to transact his business.

CONCLUSION

Appellant used the facilities of the appellee to the best of his ability. He had no reasonable alternative but to pursue the route that subsequently caused his injury.

The failure of the appellee to furnish a safe place for the appellant as a business invitee to load his appliances, was the proximate cause of the accident. Appellant therefore respectfully requests this court to reverse the ruling of the District Court and award the appellant the damages set forth in his prayer.

Respectfully submitted,

GRIFFIN, BOYLE & ENSLOW
CARSON F. ELLER
Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

April 1967

CARSON F. ELLER
Of Counsel for Appellant

APPENDIX A

Exhibit Number	*Offered*	*Received*
Plaintiff's A-1	R. Tr. 15	R. Tr. 16
Plaintiff's A-2	R. Tr. 15	R. Tr. 16
Defendant's A-1 through A-8	R. Tr. 52	R. Tr. 52